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Contract Controversy Decision

Matter of: University of South Carolina v. Loveless Commercial Contracting, Inc., and Liberty Mutual Insurance Company

File No.: 2016-008

Posting Date: February 21, 2018

Project No.: H27-6069-AC-2

Description: Darla Moore School of Business Construction – BP-2-Structure

BACKGROUND

Starting in 2011, the University of South Carolina (USC) issued contracts for the construction of the Darla Moore School of Business using a multiple prime contractor approach to construction. Under this approach, USC awarded one contract for the relocation of electrical, another for site work and paving identified as Bid Package (BP) 1, another for the building foundation and structure identified as BP 2, and yet another for the remainder of the work identified as BP 3. The work of each of these contracts was sequential in nature with the work of the latter depending on the work of the former.

Sometime in February 2012, USC and Loveless Commercial Contracting, Inc. (Loveless), executed a contract for BP2. On August 12, 2012, USC and B. L. Harbert International, LLC (Harbert), executed a contract for BP3. Before the contract for BP3 was executed,¹ Harbert warned USC that Loveless was more than 30 days behind schedule and requested that USC delay the Notice to Proceed until Loveless had accomplished enough work for Harbert to start all its critical work. Harbert warned USC that it would make claim for an immediate time extension if the Notice to Proceed was issued before Loveless' work had progressed to a point to allow Harbert to mobilize completely and deploy its construction forces. USC delayed issuing the Notice to Proceed by three weeks. In Harbert's opinion, though, this was not nearly long enough. From that point forward, Harbert provided regular written notices to USC under their contract that Loveless' poor workmanship, sequencing of work, and lack of progress was impeding and

¹ USC posted its Notice of Intent to Award the contract for BP3 to Harbert on July 5, 2012.

substantially delaying Harbert's performance. On May 22, 2015, Harbert submitted to USC and its architect a written claim for an increase in the contract time and contract sum. This contract controversy has its genesis in those claims.

Loveless and Harbert did not have a contractual relationship with one another. According to § 6.2.3 of the General conditions of its contract with Harbert, USC was "responsible to [Harbert] for costs [Harbert] incurs because of a separate contractor's delays, improperly timed activities, damage to the Work or defective construction." In the same provision of USC's contract with Loveless, Loveless was responsible to "reimburse [USC] for costs [USC] incurs that are payable to a separate contractor because of "Loveless'] delays, improperly timed activities or defective construction."

USC's architect failed to make a preliminary finding on Harbert's claim within the time allowed in the contract. Consequently, Harbert filed a contract controversy against USC. Months later, USC brought Loveless and Liberty Mutual into the dispute, seeking to recover any damages that USC would be required to pay Harbert. USC and Harbert eventually settled their claim for \$3,934,102. USC now wants Loveless and Liberty Mutual to pay it the settlement amount.

The following relevant facts and dates are largely undisputed:

March 2, 2012	USC Issues Notice to Proceed to Loveless
March 9, 2012	Date of Commencement of the Work for BP2 per the Notice to Proceed
August 12, 2012	USC and Harbert execute a contract for BP3
March 29, 2013	The Project Architect deems the BP2 work "substantially complete" ²
July 10, 2014	Loveless last self-performed work under the contract
July 25, 2014	Loveless' last subcontractor-performed work under the contract
Oct. 2, 2014	Loveless executes a release in favor of USC, which issues final payment to Loveless
May 22, 2015	Harbert sends USC a formal written claim, seeking time extension of 204 days and \$13,151,640 in compensation
July 25, 2015	One year after "the date the contractor [Loveless] last perform[ed] work under the contract"

² The bid documents required the contractor to substantially complete the Work within 280 calendar days of the Date of Commencement, which was December 14, 2012.

July 28, 2015	Harbert files a request for resolution of contract controversy against USC
May 20, 2016	USC joins Loveless and Liberty Mutual in the contract controversy and seeks indemnification
July 18, 2016	Loveless and Liberty Mutual move to dismiss.
April 10, 2017	Harbert settles its claims against USC.

DISCUSSION

The Motion to Dismiss filed by Loveless and Liberty Mutual asserts three grounds: (1) USC's claims are time-barred; (2) USC failed to satisfy conditions precedent for asserting a claim against Loveless' performance bond; and (3) USC released its claims.

USC's claims are time-barred by § 11-35-4230(2)

Section 11-35-4230(2) states in relevant part as follows:

A request for resolution of contract controversy **must be filed within one year of the date the contractor last performs work under the contract**; except that in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

(emphasis added). In this case Loveless last performed work on the project on July 10, 2014. Its subcontractor last performed work on July 25, 2014. USC, however, did not request a resolution for contract controversy until May 20, 2016 - roughly ten months after § 11-35-4230(2)'s limitations period had expired.

Section 11-35-4230(2) is clear and unambiguous. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose a different meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted). According to the plain text of § 11-35-4230(2), USC's claims against Loveless and Liberty Mutual are time-barred.

USC argues several reasons why its contract controversy is not barred. USC first argues that its indemnity claims are derivative and, as such, USC's claim against Loveless is not "a free-standing contract controversy" but rather a part of Harbert's claim against USC.³ Therefore, USC

³ It is not clear to the CPOC that USC's claim is, in fact, one for indemnification. USC quotes a portion of § 3.18 of the General Conditions, Indemnification, in its response to Loveless' motion. The contract provides that claims

argues, its claims against Loveless are preserved because Harbert brought its claims within the one-year statutory period in § 11-35-4230(2). In support, USC cites *Miller v. Servicesmaster, Inc.*, 314 S.C. 429, 445 S.E.2d 446 (1994), which held that the statute of limitations in § 15-3-530 did not bar an indemnity claim. “As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant.” *Id.* at 444, 445 S.E.2d at 449.

Miller, however, does not help USC, because § 15-3-530 does not contain an express accrual date. That statute simply states that an action must be brought “within three years” and leaves it to case law to determine when the clock starts running. In contrast, § 11-35-4230(2) has an express accrual date —“the date the contractor last performs work under the contract”— that is clear and unambiguous.

Second, USC argues that when two statutes of limitations conflict, the more specific statute governs. *See Capco v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). According to USC, the eight-year limitation in the “more-specific” § 15-3-640(6) (Actions based upon defective or unsafe condition of improvement to real property), should trump the “less-specific” § 11-35-4230(2). First, § 15-3-640 applies to construction projects generally, while § 11-35-4230(2) applies specifically to construction acquired by the government. Second, § 11-35-25 provides that, if the Procurement Code applies to a procurement, the provisions of the Code supersede all conflicting laws. Finally, § 11-35-4230 is the exclusive means of resolving contract controversies between the State and a contractor. *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001). To the extent there is any conflict between §§ 11-35-4230(2) and 15-3-640, the former statute must control.

Finally, the “delays and disruptions” in the Darla Moore project were not the result of latent defects. Rather, they were based on issues of which USC had been aware since the summer of 2012. (*See Loveless’ Motion*, pp. 5-6 for a list of the letters addressing these issues). USC’s Memorandum in Opposition seems to concede the point, as it does not appear to argue that the defects were latent.

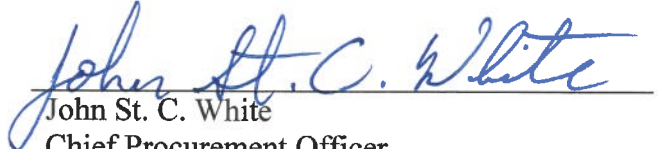
Having found that USC’s claims are time-barred by § 11-35-4230(2), the CPOC need not address the remaining issues raised in Loveless’ motion to dismiss.⁴

under § 3.18 survive termination or expiry of the contract. Those indemnity obligations, though, are expressly limited to claims for “bodily injury, sickness, disease or death, or to injury to or destruction of tangible property....” The obligation USC seeks to enforce arises under § 6.2.3, quoted above, not § 3.18.


⁴ This case does not present the issue of how the limitations period might be applied had Loveless initiated the request for resolution and USC responded by raising its settlement of the Harbert action as a counterclaim. A sharp lawyer might advise a contractor to wait until the 365th day after completing its work, before filing a request for resolution, in hopes that any counterclaim by the State would thus be time-barred. This would be a risky gamble. *Cf. Holley v. Rabb*, 46 S.C.L. (12 Rich.) 185 (1859) (at common law commencement of action does not arrest the statute of limitations on a counterclaim) with *Burlington Industries v. Milliken & Co.*, 690 F.2d 380 (4th Cir. 1982) (Rule 15(c), FRCP, should be read to allow a compulsory counterclaim to “relate back” to the date complaint was filed). The issue whether a compulsory counterclaim can be lost to limitations even though the underlying claim was timely filed is not before the CPOC. Regardless how a CPO might rule on this precise issue, a defense of recoupment (a

CONCLUSION

For the foregoing reasons, USC's claims against Loveless and Liberty Mutual Insurance Company are dismissed.



John St. C. White
Chief Procurement Officer
For Construction



Date

Columbia, South Carolina

claim asserted to reduce or defeat the plaintiff's recovery, but not allowing defendant any affirmative recovery against plaintiff) is unaffected by the statute of limitations. *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 268 S.E.2d 293 (1980) (applying common law to conclude that expiration of limitations period on claims under federal Truth in Lending Act did not bar recoupment defense)).

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Contract Controversy Appeal Notice (Revised July 2017)

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2016 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.